***United States Court of Appeals***

***for the Second Circuit***

# APPELLANT'S BRIEF

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# 77-7229

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UNITED STATES COURT OF APPEALS
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A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

## United States Court of Appeals

**FOR THE SECOND CIRCUIT**

ANTONIO MARRALE,

*Plaintiff-Appellee,*

*against*

CIA MAR DE NAV LLOYD BRASILIERO,

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

# DEFENDANT-APPELLANT'S BRIEF

CICHANOWICZ & CALLAN
*Attorneys for Defendant-Appellant*
80 Broad Street
New York, N. Y. 10004
(212) 344-7042

GEORGE T. DELANEY
*of Counsel*

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# United States Court of Appeals
## FOR THE SECOND CIRCUIT

ANTONIO MARRALE,

*Plaintiff-Appellee,*

*against*

CIA MAR DE NAV LLOYD BRASILIERO,

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## DEFENDANT-APPELLANT'S BRIEF

### Preliminary Statement

This is an appeal by the defendant-appellant, Cia Mar de Nav Lloyd Brasiliero (hereinafter the defendant or shipowner), from a judgment of $75,000 entered in favor of plaintiff-appellee, Antonio Marrale (hereinafter the plaintiff), (2a). There was a bifurcated trial before the Honorable Jack B. Weinstein and a jury, resulting in a verdict for the plaintiff on liability (165-166) and a subsequent finding by the jury that plaintiff should recover $75,000 (254). Judgment was entered on April 4, 1977 (2a) and defendant filed its notice of appeal on May 4, 1977 (3a).

## Issues Presented

1. Can a shipowner who surrenders control of the area where work is performed by an independent stevedore contractor, who selects and supervises the means and methods of operation, be held negligent for alleged injuries caused to the stevedore employees by equipment which is selected, furnished, operated and maintained by the stevedore?

2. Can a shipowner be held negligent for an alleged unsafe condition in the total absence of evidence of notice of that condition?

3. Was it proper for the trial judge to require the jury to determine the proportional fault of the shipowner, thereby invoking upon the jury the mistaken belief that the shipowner would pay only those damages caused by its negligence?

4. Was the verdict excessive?

## Statement of Facts

On May 31, 1973, plaintiff was employed by Pittston Stevedoring Corp., an independent stevedore contractor, as a holdman at Pier 10, Brooklyn, aboard the Brazilian vessel ITAPUI (5-6, 46). Plaintiff and his gang commenced work that date at 8:00 A.M. at hatch #2 lower tween deck (6-7, 31). When they arrived at the hatch, only half of the hatch at the deck level was open. There was cargo stowed on the other half of the #2 cover (7, 47-48).

Plaintiff's gang loaded general cargo in #2 hatch and were aided by a hi-lo or forklift machine which was put into the hatch at about 8:15 A.M. (32) to lift cargo and stow it in place (28). The machine belonged to Pittston (60, 65). Plaintiff claimed that there was smoke in the

hatch during the morning (8) and that the longshoremen complained to the deckmen and their boss (8, 10) in Italian (35). Plaintiff also claimed that the blowers supplied by Pittston were not operating (8-9). Plaintiff testified the fumes bothered him in the morning, making it difficult to breathe and making him dizzy (10-11).

Plaintiff further testified that someone from the vessel, an officer or a sailor, was present on the deck at the time the initial complaints were made to the stevedore employees on the deck and a crew member came down into the hatch, looked around and left (10). However plaintiff said he never spoke directly to any officer or sailor about these conditions (35) or made complaints to them (41). After the crew member came into the hatch, the hi-lo was changed ". . . at least two or three times . . ." (11, 34). After each hi-lo was changed, conditions improved for about half an hour (12).

Plaintiff's gang left the hatch for lunch from 12 noon to 1:00 P.M. (11), and continued working in the same hatch until 7:00 P.M. (13-14). Sometime after lunch, the gang opened up the lower hold and commenced work there (37). During the afternoon, plaintiff testified that he felt dizzy and sat down for a while (27).

Plaintiff's hatch boss was Michael Bosco, a fellow employee of Pittston Stevedoring Corp. Plaintiff did not recall how many times he saw Bosco from 8:00 A.M. to 12 noon or if Bosco came down into the hatch during this period or at any time during the day (26). Plaintiff also did not recall telling Bosco at anytime that day that he was breathing fumes from the hi-lo and that the fumes were bothering him (26). He complained only to the deckmen (26), including the signalman (33). These were fellow employees of the plaintiff.

Plaintiff left the vesel at 7:00 P.M. and did not report any dizziness or anything else to anyone at the Pier (27-28). He went home, had a little dinner and went to bed at

about 7:30 P.M. (14). At about 1:30 to 2:00 A.M. he awoke with a feeling he was suffocating and couldn't breathe (14). He claimed he had no pain in his chest (39) and also denied ever having prior pain in his chest or trouble breathing and denied having been to the ILA Clinic for that condition (40). An ambulance was called and he was taken to Long Island College Hospital (15) where he was admitted as an inpatient for one week (16). On discharge, plaintiff claimed he still had trouble breathing (17).

The Long Island College Hospital records indicate that plaintiff was admitted to the emergency room at 3:00 A.M. on June 1, 1973 (177), with complaints of chest pain. The admitting diagnosis was coronary insufficiency (174).

Plaintiff was in the emergency room for 3-4 hours and was hooked up to a cardiogram machine (218) and given fluids intravenously (177). He was confined to bed for four days, given X-rays and electro cardiograms (178). The discharge diagnosis was chest pain—cause unknown (174).

Plaintiff was sent to Dr. William Dunaway by his attorney (29) on June 13, 1973 (117-118) and Dr. Dunaway saw him on six further occasions, the last time on June 27th (173). On June 29th plaintiff left for Italy (30), allegedly to see his sick mother-in-law (19). While in Italy, he claims he had trouble breathing and saw a Dr. Licata and was X-rayed and had injections. This treatment continued during the period he was in Italy (19-21).

Upon his return to New York, on September 6 or 7th, plaintiff commenced work (23, 222) without getting any further medical treatment (222). Thereafter, plaintiff went to the ILA Clinic on various occasions but could only recall going there for treatment for a cold (24).

Plaintiff claims that since returning from Italy, to date, whenever he works with a hi-lo, he has trouble breathing

(221), but has never reported these incidents to the timekeeper (225-226) and the ILA Clinic medical records indicated no history of breathing fumes (209), either before or after this incident.

A fellow longshoreman, Angelo Peritre, testified that he was in the same gang and was plaintiff's partner on May 31, 1973 (45). He recalled working in a hatch, loading cargo which was mostly on pallets and that hi-los were used (48-49). The stevedore installed two blowers in the hatch, one in each corner (49-50).

During the morning, the hi-lo smoked and it was changed (50), at least twice (51). Complaints were made to the gangwayman on deck (52) and a mate or mates were present when complaints were made (52). A mate came into the hatch at least once during the morning (53). Complaints were made in the morning to the mate about smoke from the hi-lo and longshoremen were coughing (53). The hi-lo was changed thereafter (50-51). Peritre could not hear the ventilators operating (54-55) and thus assumed they were not working (54). Although complaints were made to the gangwayman about smoke from the hi-los, he never stopped the men from working (55-56).

Peritre also complained to the hatch boss, Bosco, at 12 noon about the fumes and the hi-lo was changed thereafter (58-59). Bosco never came into the hatch in the morning (57) and Peritre never complained to him from 1:00 P.M. to 7:00 P.M. He complained only to the gangwayman (58-59).

Hatch boss, Michael Bosco, was subpoenaed to testify and he did not remember whether the hatch was half open (65). He did recall complaints about a hi-lo and he replaced it (65). He did not recall any further complaints during the day (65-66).

Bosco recalled using blowers in the hatch but did not recall the number used (66). He said that blowers have

electric motors which blow air from the deck down a sleeve or hose into the hatch (67). He didn't recall if anyone complained to him about the blowers (67), but confirmed that if complaints of coughing or dizziness were made to him, or if it was reported to him that the ship's ventilators were not operating, he would have gone to the foreman and told him to stop work (67-69). He didn't recall if there was a work stoppage (69).

Bosco also admitted that he could tell from breathing the air whether there were excessive fumes in a hatch but he did not make it a practice of going down in the hatch when a hi-lo was working (72).

The shipowner produced proof that when hi-los are used in hatches, the Safety and Health Regulations for Longshoring, Sect. 1504.93 applied (86), and required that adequate ventilation be provided by the stevedore, whose responsibility it was to see to it that the Regulations were complied with (87). There was also proof that longshoremen do not take orders from a ship's mate. They look to their hatch boss for orders and he relies on the ship's foreman who, in turn, takes orders from the superintendent (91). If a dangerous condition exists, they have the authority to stop work (91).

Pittston's Claims Director, Edward Buderwitz, testified that the first notice of this incident was received by the timekeeper on the pier on June 14, 1973, two weeks after plaintiff worked on the vessel. The timekeeper sent plaintiff to Buderwitz and he spoke to plaintiff and prepared a Superintendent's Accident Report (110-112).

On the issue of damages, Dr. William Dunaway testified that he first saw plaintiff on June 13, 1973 (172) and that plaintiff gave him a history of chest pains, dizziness and nausea on the evening of May 31, 1973 and as a result, plaintiff was admitted to Long Island College Hospital (171). Dr. Dunaway examined plaintiff on June 13, 1973,

and had him X-rayed. The X-rays were negative and showed the lungs were clear, but Dr. Dunaway concluded that plaintiff was suffering from an irritation of the upper and lower respiratory tract, possibly gas fume irritation (172). This was based on the history given by plaintiff and his subjective complaints (195-196). Treatment consisted of medication for his breathing problems and sedatives. Rest at home was advised (173).

Plaintiff was seen by Dr. Dunaway seven times from June 13 to June 27th and treatment consisted solely of medication for breathing and sedatives (173). Plaintiff then went to Italy and never returned for treatment (174).

The issue of liability was submitted to the jury initially and the jury found that defendant was negligent, that 50% of the negligence causing plaintiff's injury was attributable to defendant and that plaintiff was not negligent (165-166).

The trial then proceeded on damages and the jury returned a verdict for plaintiff in the amount of $75,000.

Defendant moved at the end of plaintiff's case to dismiss the complaint for failure to prove a *prima facie* case. This motion was denied. Defendant moved at the end of all the proof for a directed verdict and this motion was also denied (162-164)

After the verdict, defendant moved for judgment notwithstanding the verdict and for a new trial on the ground of excessiveness. These motions were also denied (256-257).

## POINT I

**Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Act longshoremen may only recover under concepts of land-based negligence law.**

Since plaintiff's accident occurred on May 31, 1973 he cannot recover unless the defendant was negligent under the standards which Congress intended to be established under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 905(b), which Amendments were effective November 26, 1972. As the Court of Appeals pointed out in *Napoli* v. *Hellenic Lines, Ltd.*, 536 F.2d 505 (2 Cir. 1976), not only did the Amendments abolish the doctrine of unseaworthiness as a basis for liability, but "Congress did not intend that a concept of negligence approximating no fault liability should take its place."

"Also eliminated was the concept of a non-delegable duty to provide a safe place to work." Id. at 507.

The purpose of the Amendments was (1) to increase the direct compensation benefits to injured longshoremen and (2) decrease the number of injuries by placing the responsibility for safety and payment on the party who is in the best position to prevent such injuries, that being the stevedore contractor in most instances. *Munoz* v. *Flota Mercante Grancolombiana, S.A.*, 553 F.2d 837, 839 (2 Cir. 1977).

To achieve this purpose Congress (1) increased substantially compensation benefits to longshoremen; (2) prohibited the employer's being sued for indemnity under *Ryan;* and (3) eliminate the longshoremen's right to sue the vessel owner for any cause of action other than under land based concepts of negligence. *Munoz, supra,* at page 840. In discussing the intent and purpose of the Amend-

ments this Court in *Munoz, supra,* at page 840 also went on to state:

> "The amended Act is a paradigm of political compromise. Injured workers would enjoy significant improvement in the level of benefits. The stevedore employer, now rid of the yoke of indemnification suits, *would be induced to insure employee safety by increased compensation awards.*" (Emphasis supplied)

Thus, while Section 905(b) as amended, permits suits by longshoremen against the shipowner based on negligence, it is only when such negligence is the proximate cause of the accident that recovery may be had. As the Court noted in *Napoli* v. *Hellenic Lines,* 536 F.2d 505, 507 (2 Cir. 1976):

> "* * * no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services."

Since plaintiff's injuries, if any, were caused by the equipment which was selected, furnished, operated and maintained by the stevedore contractor, then the defendant should not be held liable for the plaintiff's alleged injuries. The stevedore contractor had assumed control of the work area and was in the best position to appreciate, promulgate and enforce proper and applicable safe stevedoring work practices, rules and regulations. In fact, the stevedore attempted to do just that by removing, earlier in the day, hilos which were smoking excessively, and replacing them with other equipment, installing portable blowers and by periodically taking carbon monoxide readings. *Gay* v. *Ocean Transport and Trading Ltd.,* 546 F.2d 1233, 1242 (5 Cir. 1977); *Brown* v. *Mitsubishi Shintaku Ginko,* 550 F.2d 331, 334 (5 Cir. 1977); *Hess* v. *Upper Mississippi Towing Corp.,* —— F.2d —— (5 Cir. 1977) Sept. 23, 1977.

## POINT II

**The shipowner owes no duty to the employees of an independent expert stevedore for conditions created by the expert stevedore after commencement of the stevedore's work.**

On May 13, 1973 the vessel turned over #2 hold to the stevedore in a safe condition. Thereafter, the stevedore chose to use lifting equipment commonly called "hilos" as an aid in the loading of cargo. This equipment, according to the plaintiff's testimony, was not operating properly and it emitted an excessive amount of fumes.

The shipowner has a duty to turn the work area over to the stevedore contractor in a reasonably safe condition, or alternatively, to warn the stevedore contractor of any latent unsafe conditions of which the shipowner has knowledge and which the stevedore is unlikely to discover by a reasonable inspection. *Munoz, supra,* at page 841; *Ruffino* v. *Scindia Steam Navigation Co.,* 559 F.2d 861, 862 (2 Cir. 1977).

The work area was reasonably safe when the work began. The stevedore contractor elected to furnsh equipment that was allegedly unsafe. They replaced it. Whether the replaced equipment was safe and adequate was solely a matter for the stevedore to determine. They possessed and utilized the means by which to so determine.

Thus, where as here, the stevedore in the course of its duties creates a dangerous condition with its own equipment, the stevedore must take the necessary steps to correct the dangerous condition especially where the means to do so is within the control of the stevedore, and its failure to so do does not impose liability upon the shipowner. *Brown, supra; Gay, supra; Hurst and Minus* v. *Triad Shipping Company,* —— F. Supp. —— (E.D. Pa. 1976) Civil 74-1143, aff'd —— F.2d —— (3 Cir. 1977) Docket No. 76-1923.

Additionally, as stated in *Gay, supra,* the Safety and Health Regulations for Longshoring, Section 1918.93 imposes upon the stevedore the obligation not only to monitor the amount of carbon monoxide in a hold or hatch, but further provides that the stevedore should provide adequate ventilation if the vessel does not have ventilators or if they are not operating. In view of plaintiff's claim that the ship's ventilators were not in operation, then the stevedore had a duty to see that the ventilators were turned on or to provide additional blowers for ventilation purposes. The stevedore's failure to perform its duties properly should not impose liability upon the shipowner.

Once the expert stevedore has commenced to load the vessel, which had been turned over to it in a safe condition it was the duty of the stevedore, not the shipowner, to take such further steps as were necessary to insure that the vessel remained a safe place in which to work. The shipowner did not have to check to determine if the stevedore was doing his job properly. *Amuszewski* v. *Dynamic Mariners Corp.,* 391 F. Supp. 1143 (D. Md. 1975) aff'd 540 F.2d 757 (4 Cir. 1976).

In view of the above, the Court was in error in refusing to grant defendant's motion for a directed verdict and for judgment notwithstanding the verdict. This Court should reverse and dismiss this case or return it to the District Court for a new trial.

## POINT III

**There was no proof of notice to the ship's officers or crew concerning the alleged dangerous conditions in hatch no. 2.**

It is axiomatic that before plaintiff can recover in an action based on negligence, that the plaintiff must prove that the defendant had notice of the alleged unsafe condition and an opportunity to alleviate or correct it. *Hite*

v. *Maritime Overseas Corporation,* 380 F.Supp. 222 (ED Tex. 1974); *Fedison* v. *The Vessel Wislica,* 382 F.Supp. 4 (ED La. 1974); *Ruffino, supra* at p. 862.

The only evidence in this action was that the defendant shipowner had notice in the warning of a malfunctioning hi-lo machine, but the testimony is clear that the machine was replaced at least once during the morning. Plaintiff left the hatch at noon and returned one hour later. It is his claim that he became ill in the afternoon. There is absolutely no proof of notice to any ship's officer or crew member during the period of 1 p.m. to 7 p.m., that the hi-lo machine was malfunctioning or that the ship's blowers were not operating.

The defendant could have assumed and probably did that since the longshoremen replaced the hi-los in the morning, that there were no further problems. The only inference which can be drawn from the testimony was that during the afternoon the operation was proceeding smoothly since the machines had been replaced, there was no interruption of work and the stevedore continued to take atmospheric tests required by law. Furthermore, there were no complaints made to the ship's personnel and also none were made to the hatch boss. Added to this was the fact that no other longshoremen became ill and none reported any illness. In fact plaintiff reported his alleged injury or illness to his employer for the first time two weeks after the claimed incident.

Since the work area was reasonably safe, especially after 1 p.m., reasonable care thereafter on the part of the shipowner did not require the ship's officers to inspect the work areas to be sure that the stevedore was properly performing its work. *Slaughter* v. *S.S. Ronde,* 390 F. Supp. 637 (S.D. Ga. 1974), aff'd 509 F.2d 973 (5 Cir. 1975); *Teofilovich* v. *D'Amico Mediterranean Pacific Line,* 415 F. Supp. 732 (C.D. Calif. 1976). Also see *Munoz,*

*supra* at pages 840-841:

> "The shipowner had no duty to supervise the minute details of work totally entrusted to the competence of the stevedore. Indeed, commercial reality and applicable union regulations preclude a rule that would require a non-expert constantly to intrude on the work of the master stevedore in the deepest recesses of the ship."

Having no duty to intrude into the lower hold and inspect the progress of work and having no reason to believe that work was not progressing satisfactorily under the direction and control of the stevedore contractor, the shipowner cannot be held liable for a condition of which it had no notice.

## POINT IV

### The verdict of $75,000 was grossly excessive.

The jury awarded plaintiff $968 covering one month's loss of wages (June), $1,125 for the Long Island College Hospital bill and almost $73,000 for pain and suffering. Defendant submits that the latter figure is so excessive under the proof in this action that it should shock the conscience of this Court and result in a new trial or a remittitur of at least $65,000.

From the manner in which the jury rendered its verdict we have an unusual opportunity to see how the jury arrived at its verdict. When the jury first returned, the Forelady commenced to deliver the verdict as follows:

> "The Forelady: We find for the plain $73,000 plus salary for June and hospital expenses."
>
> "The Court: Give us the total."
>
> "The Forelady: The salary for June is $968 . . ."
>
> "The Court: Why don't you do this, go back for a few minutes, take out your pencils and all agree on

what the verdict should be. For legal reasons, I think it would be better." (254)

The jury returned in a few minutes with a verdict of $75,000 (254). Had the Court allowed the Forelady to finish her sentence, we would have had it clearly spelled out that the jury intended to award plaintiff:

$73,000—for pain and suffering;
968—loss of salary for June;
1,125—hospital bill (182-183)

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$75,093 TOTAL

Instead of this total, the jury rounded the figure out to $75,000. We submit that quite obviously the evidence does not support a finding of $72,907 for pain and suffering for the liimted period for which the jury found plaintiff disabled. The jury evidently decided that plaintiff had recovered after one month of "treatment" although at the same time it declined to award the treating doctor his fee. The jury also evidently, without any medical proof to support the award, concluded that plaintiff's period of hospitalization was related to his claim of having breathed an excessive amount of fumes and awarded plaintiff the hospital bill.

There was no credible proof in the records of treatment or the testimony that plaintiff suffered from any permanent condition relating to his alleged injury. His claim of permanency was based on Dr. Dunaway's testimony that plaintiff's subsequent record of treatment for colds and coughs from October 1973 to date was related to the breathing of fumes on May 31, 1973 (192-193) and plaintiff's claim that he still has trouble breathing while working around a hi-lo (221). Plaintiff's earnings records (Ex. F) for 1974, 1975 and 1976 show him working more hours each year than previously and the ILA medical rec-

ords (Ex. D) showed no complaints of breathing fumes (209). He complained of ear aches, coughs, fever, etc. which were diagnosed as being related to colds.

This Court has the right to examine the amount of verdicts and to set aside or reduce those which are excessive, *Caldecott* v. *Long Island Lighting Company,* 417 F.2d 994 (2 Cir. 1969); and *Dagnello* v. *Long Island Railroad Company,* 289 F.2d 797 (2 Cir. 1961). This power has been exercised by this Court in appropriate cases, see *Wicks* v. *Henken,* 378 F.2d 395 (2 Cir. 1967); *Sharkey* v. *Penn Central Transportation Company,* 493 F.2d 685 (2 Cir. 1974); and most recently, *DeMauro* v. *Central Gulf S.S. Corp.,* 514 F.2d 403 (2 Cir. 1975).

In *Imperial Oil Ltd.* v. *Drilk,* 234 F.2d 4 (6 Cir. 1956), the plaintiff was a 64 year old longshoreman who sustained fractures of 5 or 6 ribs, fracture of the left shoulder, fracture of the middle third of the right fibula and fracture of both bones of the left ankle. An award of $20,400 for pain and suffering was considered reasonable but an award of $33,00 for loss of future earnings was reduced to $25,000. If an award of $20,400 for pain and suffering in *Drilk* was found reasonable for the injuries suffered, the award herein of almost $73,000 for an irritation of the respiratory tract is surely excessive.

A further explanation for the excessive verdict was the Court's submitting to the jury a question of proportional fault. The jury found the negligence causing plaintiff's injury was attributable 50% to defendant (165-166). The significance of this finding was not explained to the jury when they considered damages and it is likely that the jury assessed the larger figure because they thought the recovery would be reduced by 50% to $37,500.

For the stated reasons, the verdict should be set aside or a remittitur granted.

## CONCLUSION

**It was an abuse of discretion for the District Court to deny defendant's motions for a directed verdict and for judgment n.o.v. The latter motion should be granted and this action dismissed, or in the alternative, a new trial should be granted or the verdict reduced by a remittitur.**

Respectfully submitted,

CICHANOWICZ & CALLAN
*Attorneys for Defendant-Appellant*
80 Broad Street
New York, New York 10004
(212) 344-7042

GEORGE T. DELANEY,
*of Counsel*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANTONIO MARRALE,

Plaintiff-Appellee,

vs.

CIA MAR DE NAV LLOYD BRASILIERO,

Defendant-Appellant.

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State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 18th day of November, 1977, he served two copies of the Defendant-Appellant's Brief on Irving Bushlow, Esq.

the attorney for the Appellee by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorney at No. 26 Court Street, Brooklyn, ( ) N. Y., that being the address designated by him for that purpose upon the preceding papers in this action.

David F. Wilson

Sworn to before me this
18th day of November, 1977.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978